No. 10,996

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE KERR, *Appellant*,

vs.

P. J. SQUIER, Warden of the United States Penitentiary, McNeil Island, Washington, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

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REPLY TO APPELLEE'S FIRST QUESTION

An examination of the cases cited by the respondent in support of his contention relative to the first question set forth in his brief will disclose that without exception they do not support the argument whatsoever.

In support of the contention that the theft of three mail bags taken at the same time from a mail custodian constitutes separate offenses under Title 18, U. S.C.A., Section 317, the appellee relies upon a chain of cases stemming from *Ebeling v. Morgan*, 237 U.S. 625.

It is significant that only a small portion of the

opinion of *Ebeling v. Morgan, supra,* is set forth in the brief of the appellee. A complete reading of that case will show that it went solely to the question of whether separate offenses are committed when defendant, while in the course of one transaction, cuts individual mail bags. Since the cutting of a mail bag is specifically denominated a crime under Title 18 U.S.C.A., Section 312, and as the gist of the offense is the cutting, it is obvious that a valid distinction lies between the simultaneous taking of three bags from one custodian and the cutting of three bags. Under Section 312 it would be impossible to conceive of a factual situation wherein a defendant did simultaneously cut three bags with intent to obtain possession of the contents thereof. It is significant that although the statutes of the United States make it a crime to steal mail matter, the *Ebeling* case, *supra,* specifically states that there is a distinction between a transaction wherein an offense is completed as in the cutting cases, and other types of crimes where the act is also a continuous transaction,

> "when the facts showed that there was but one offense committed between the earliest day charged and the end of the continuing time attempted to be charged in separate indictments. These and similar cases are but attempts to cut up a continuous offense into separate crimes in a manner unwarranted by the statute making the offense punishable." *Ebeling v. Morgan,* page 630.

The case of *Phillips v. Biddle* (C.C.A. 8, 1926) 15 F. (2d) 40, is cited in appellant's brief as authority for his position. The case was heard by the Circuit Court on a totally different question. The matter at issue

there was whether or not the theft of mail bags could be punishable under the section under which the appellant was sentenced or under a separate and distinct section of the code. That question became important because if appellant was correct the Court had imposed a sentence in excess of the statutory limits under the proper section. The question at issue here was not raised in the *Phillips* case except that in the opinion, by *obiter dicta*, the court stated gratuitously that the theft of separate bags constituted separate offenses and cited as authority therefor the *Ebeling* case, *supra.*

In other words, appellant does not quarrel with the rule that cutting mail bags constitutes a separate offense for each mail bag cut. Indeed, this Circuit Court has voiced that rule in *Johnston v. Lagomarsino*, 88 F.(2d) 86, 88. It is significeant however, that after so holding in the *Lagomarsino* case it was then held that the taking of separate pieces of mail matter from a locked mail pouch, a depository for mail, cannot be set out as separate offenses for each piece of mail matter taken. Thus it seems to us that the cases cited by appellee do not bear upon the question before the court at the present time. They also cite as authority for their position the case of *Blockburger v. U. S.*, 284 U.S. 299. This case clearly sets forth the distinction that should be applied to a determination of the question here before the court. In the *Blockburger* case, *supra*, the defendant was charged under an information containing three counts, the pertinent question was raised under the construction of the sentence under Counts 2 and 3 thereof. Each of these counts

alleged a sale of narcotics on successive days to the same purchaser and the contention was made that this constituted one simultaneous transaction and thus punishable as only one crime. The United States Supreme Court very properly distinguished this case setting forth the rule that if the sale or sales had been simultaneous, and all part of one transaction, and not selective, then the appellant's position would be correct.

The appellee cites *McKee v. Johnston*, 109 F.(2d) 273, as authority for his position. In order to reach a proper determination of the question now before the court, it is necessary to carefully examine not only the *McKee* case above cited, but the later *McKee* case reported as *McKee v. Johnston*, 125 F.(2d) 282. McKee was charged with the abstraction of letters from a number of different mail pouches, all of the takings having been committed during the course of one transaction. There was no record before the court as to precisely how these crimes were committed and the court therefore in *McKee v. Johnston*, 109 F.(2d) 273 at page 275, said as follows:

> "In *Johnston v. Lagomarsino*, *supra*, it was held that separate counts allegedly abstracted at the same time of three different parcels from the same mail pouch charged but a single offense.
>
> "Here there was a feloneous taking of mail matter from each of six different pouches. It may be assumed and the assumption is properly warranted by the language of the indictment, that each taking was part of a continuous transaction. *However, it does not appear that the takings were simultaneous* (Italics ours). Since

> the record is not before us we are entitled to assume, in support of the judgment that the takings were not simultaneous and that they were selective." Cases cited.

It is apparent then, that the *McKee* case is not authority for our present position. We are not unmindful of the fact that this *McKee* case above cited was mentioned with approval and cited as authority when this same appellant was before this court in *Kerr v. Johnston, Warden,* 130 F.(2d) 637. While we contend that the precise question raised by this appeal was not then before the Circuit Court (See appellant's opening brief) nevertheless, if it was the record at that time could be said to be of the same kind as the record before the court in the *McKee* case above cited. However, the factual situation is now different. The trial court in our instant case has made a positive "finding of fact" to the effect that the takings of the three mail pouches in the instant case was *simultaneous and all one transaction.* That being so, the *McKee* case above quoted ceases to be authority for the appellee's position.

The *McKee* question again came before this court in *McKee v. Johnston,* 15 F.(2d) 282. An attempt was made to prepare and submit to this court a record showing that the takings were not selective and were simultaneous. However, the court held that the record was not complete and that there was no showing that the takings were simultaneous and not selective. In that case the court inferentially approved the holding in *Colson v. Johnston, Warden* (D. C. Cal. 35, Supp. 317) and the court's statement thereof is set forth

in full in the appellant's opening brief at page 9 thereof.

If one were to pursue appellee's argument, the logical result would be that depending solely upon the number of individual articles stolen as for example, sheep, a person could receive a much greater penalty for simple larceny than could be imposed for the violent crime of robbery. It is inconceivable that the intent of the congress should be so construed.

REPLY TO APPELLEE'S SECOND QUESTION

It is submitted that the appellee has not in any manner whatsoever, answered the appellant's question as to the proper procedure to be taken where, as in this instant case, the appellant has been fined under a judgment and committment valid on its face, but in fact invalid, as to part as being excessive where as part of that judgment and committment he was required to pay a fine and where he is unable to pay that fine. A careful reading of *Hogan v. Hill*, 9 F. Supp. 333, will show the procedure adopted by the appellant in this case is of necessity the proper one. Certainly a United States Commissioner would not have the authority to determine the validity of punishment imposed under a judgment and commitment valid on its face.

CONCLUSION

The gist of the crime under Counts 4, 5, and 6, of the indictment here is the *taking of mail matter from and out of a post office.* This defendant admits that he did so commit that crime by his entry of a plea of guilty and by his service of the punishment imposed under Count 4 of the indictment. That being so, and the trial court having made its finding of fact that the taking was simultaneous and all one transaction (Tr. 20-21) it would conclusively appear that this court should hold that the sentences imposed on Counts 5 and 6 of the indictment are void and excessive and remand this matter to the trial court with instructions to permit the appellant to make his application to the U. S. Court to be adjudged a pauper or poor prisoner under the provision Title 18, U.S.C. A., Section 641, and if he does so qualify to order his discharge under a writ of habeas corpus.

Respectfully submitted,

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